UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

JI SHIANG, INC.

and **Case No. 29-CA-29927**

LOCAL 318, RESTAURANT WORKERS' UNION

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for the Acting General Counsel
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SUPPLEMENTAL DECISION

Statement of the Case

LAUREN ESPOSITO, Administrative Law Judge. This supplemental proceeding was tried before me in Brooklyn, New York, on June 9, 2011. A compliance specification and amended compliance specification and notice of hearing were issued on February 18 and May 12, 2011, respectively, based upon an unpublished order of the Board dated November 9, 2010,[1] which provided that Ji Shiang, Inc. take certain affirmative action, including offering Li Rong Gao and Xiao Hong Zheng employment in the positions they applied for and making them whole for any loss of earnings or other benefits resulting from Respondent's discrimination against them. On February 7, 2011, the United States Court of Appeals for the Second Circuit issued its judgment enforcing the Board's order.

On June 8, 2011, Counsel for the Acting General Counsel (the "General Counsel" filed and served a notice to amend the compliance specification, and when the hearing opened the next day General Counsel moved to make the relevant amendments. I granted General Counsel's motion.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

[1] The Board's November 9, 2010 order was based on the decision and recommended order of Administrative Law Judge Steven Fish in *Ji Shiang, Inc.*, JD(NY)-36-10, dated September 20, 2010.

Discriminatees Li Rong Gao and Xiao Hong Zheng were employed by Guang Zhou Restaurant as a waitress and a captain, respectively. When Respondent took over the operations of Guang Zhou Restaurant on June 2, 2009, it refused to hire Gao and Zheng. ALJ Steven Fish found that Respondent refused to hire or consider Gao and Zheng for employment because they engaged in activities in support of the Charging Party Union, and because they engaged in other protected concerted activities, in violation of Sections 8(a)(1) and (3) of the Act. *Ji Shiang, Inc.*, JD(NY)-36-10 (September 20, 2010).

On August 2, 2010, Respondent hired Gao and Zheng as a waitress and a captain. The parties agree that Gao's backpay period terminates as of that date. However, General Counsel contends that Zheng's backpay period continued past her hiring, in that Zheng had been assigned fewer hours of work than the other captains employed by Respondent after she was hired, resulting in lower earnings. As a result, General Counsel contends that the backpay period for Zheng extends to February 13, 2011, when Ji Shiang apparently closed.

Ellen Farbin, a field examiner in the compliance division of Region 29, testified regarding her preparation of the back pay calculations for Gao and Zheng. Farbin has worked in the compliance division of Region 29 for about eight years, and has prepared numerous backpay calculations during that time. Farbin testified that because she had no payroll or other records for the period June 2, 2009 through July 1, 2009, she calculated gross backpay based upon Gao and Zheng's reports of what they were earning at Guang Zhou and at Ji Shiang after they were hired. Farbin testified that because Respondent's payroll records were available for the period July 1, 2009 through August 2, 2010, she based Gao and Zheng's gross back pay on the average hours, wage rates, and tips earned by comparable wait staff and captains during that period. For Zheng, Farbin based her calculations during the period August 2, 2010 to February 13, 2011 on Respondent's payroll records.

Farbin testified that her calculation of tips involved two separate components. She began with the tip amounts contained in Respondent's payroll records for comparable employees, and then added $200 per week, which was reported to her as an additional amount of tips each employee received that was not recorded in the payroll records. Wei Shen Tan, a waiter employed by Respondent who had also been employed by Guang Zhou, testified regarding cash tips which were not documented in Respondent's payroll records. Tan testified that he began working at Ji Shiang on the day it opened in June of 2009. Tan testified that employees at Ji Shiang shared in a tip pool in addition to their direct wages. Tan testified that for the month of June 2009 he received $600 direct wages in cash and a little more than $2,000 in tips. He testified that beginning in July 2009 he was paid by check, and earned $4.60 (later $4.65) per hour in direct wages. Tan's share of the tip pool was .8 until Gao and Zhen returned to work in August 2010, and was then increased to .9. Tan testified that his monthly tip income totaled $600 to $700 per week on a good month, and $400 per week when business was slower. However, he testified that his total tip income never appeared on his pay stub,[2] and that in general he earned approximately $200 to $300 in tips each week which were not recorded.

Analysis and Conclusions

A. General Legal Framework

[2] Tan's pay stubs for July 2009 state that he earned between $175 and $215 in tips per week.

The objective in compliance proceedings is to restore to the extent feasible the status quo ante, by restoring the conditions which would have existed absent the Respondent's unlawful conduct. *See, e.g., Parts Depot, Inc.*, 348 NLRB 152 153 (2006). The General Counsel is permitted "wide discretion" in choosing a formula to calculate backpay, and must only "establish gross backpay amounts that are reasonable, and not arbitrary." *Id.*, *citing Performance Friction Corp.*, 335 NLRB 1117 (2001).

Once the General Counsel has established the amounts of gross backpay due, the Respondent then bears the burden of substantiating affirmative defenses, including willful loss of interim earnings and the failure of a discriminatee to mitigate damages. *Midwestern Personnel Services*, 346 NLRB 624, 625 (2006). When a respondent argues that a discriminatee has failed to adequately search for interim work, the respondent must satisfy a burden of coming forward with evidence that substantially equivalent jobs existed in the relevant geographic area during the backpay period. *St. George Warehouse*, 351 NLRB 961, 967 (2007). If the respondent does so, the burden then shifts to the General Counsel to "produce competent evidence of the reasonableness of the discriminatee's job search." *Id.* When a respondent argues that a discriminatee has willfully avoided or failed to retain substantially equivalent work, it must adduce evidence demonstrating that the discriminatee voluntarily quit interim employment or lost interim work through deliberate or gross misconduct. *Baker Electrics*, 351 NLRB 515, 565 (2007), *citing Minette Mills*, 316 NLRB 1009, 1010 (1995); *Basin Frozen Foods*, 320 NLRB 1072, 1077 (1996).

B. Respondent's Specific Contentions

I find that the gross backpay formula used by the General Counsel, as discussed by Farbin in her testimony, was reasonable.[3] Respondent's contention that the use of comparable employees to calculate gross backpay was somehow unreasonable is contrary to well-settled Board law. *See, e.g., Contractor Services, Inc.*, 351 NLRB 33, 35 (2007) ("The comparable or representative employee approach is an accepted methodology for computing backpay"). Its argument that tips should not be included in the gross backpay calculations is equally meritless. *Atlantic Limousine*, 328 NLRB 257, 258 (1999) (including tips in gross backpay calculations). Indeed, Respondent provides no legal basis for either of these assertions. Nor does Respondent cite any precedent for its assertion that tips not included by Respondent in the employees' paychecks should not be encompassed in the gross backpay figures. In fact, the Board has specifically declined to adopt such a rule. *See Atlantic Limousine*, 328 NLRB at 258; *Hacienda Hotel & Casino*, 279 NLRB 601 (1986).

Respondent's argument that Zheng's backpay period should also be terminated as of August 2, 2010, the date of her reinstatement, is also unavailing. Respondent was required under the Board's order to offer Zheng the position that she applied for or a substantially equivalent position. General Counsel contends, based upon payroll records provided by Respondent, that Zheng was not offered her position or a substantial equivalent, in that she was assigned fewer work hours than the other captains. Respondent admits in its post-hearing brief that Zheng was not assigned as many hours as the other captains, but offers no legitimate reason for doing so or evidence to explain this distinction. As a result, General Counsel's gross

[3] Respondent contends in its post-hearing brief that it had legitimate, non-discriminatory reasons for refusing to hire Gao and Zheng on June 2, 2009. Such contentions were already litigated in the unfair labor practice proceeding before Judge Fish, and may not be raised again here. *See, e.g., Willis Roof Consulting*, 355 NLRB No. 48 at p. 1, fn. 1 (2010).

backpay formula reasonably incorporated the difference between the work hours assigned to Zheng and those of other employees in her job classification.

Finally, Respondent's various arguments involving failure to mitigate theories are completely unsubstantiated, and must be rejected.[4] Respondent claims in its brief that Gao did not make an adequate search for work, but it did not offer any evidence in support of this contention, including evidence regarding the availability of substantially equivalent jobs in the relevant geographic area. *St. George's Warehouse*. 351 NLRB at 967. Respondent offered no evidence to support the assertion in its brief that Zheng was fired from her interim employment, let alone that she was discharged for deliberate or gross misconduct. *Baker Electrics*, 351 NLRB at 534, 565. Nor is there any evidence in the record that Zheng voluntarily resigned substantially equivalent interim employment.[5] *Parts Depot*, 348 NLRB at 154.

For all of the foregoing reasons, I find that General Counsel's proposed gross backpay figures are reasonable. I find that Respondent has failed to establish any defenses based on a failure to mitigate damages, and that no reductions should be made from the backpay calculations contained in General Counsel's amended compliance specification. I shall therefore recommend that Respondent pay the amounts specified to the discriminatees, plus interest.

The Remedy

As stated above, I shall recommend that Respondent reimburse the discriminatees, plus interest, in the amounts as set forth in the amended compliance specification as follows:

Li Rong Gao	$36,838.89
Xiao Hong Zheng	$30,364.88

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

Respondent Ji Shiang,, Inc., its officers, agents, successors, and assigns, shall make whole the individuals named below, by paying them the amounts following their names, plus

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[4] At the hearing, I rejected Respondent's assertion that the General Counsel was required to pay for interpreters for Respondent's case. *A & A Insulation Services*, 344 NLRB 322, 324-325 (2005); *Domsey Trading Corp.*, 325 NLRB 429 (1998).

[5] Respondent's contention that unemployment benefits received by Gao and Zheng should be deducted from gross backpay is contrary to the Supreme Court's decision in *NLRB v. Gullett Gin Co.* , 340 U.S. 361, 364 (1951).

[6] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

interest to be computed in the manner prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), minus tax withholdings as required by Federal, State and local laws:

Li Rong Gao	$36,838.89
Xiao Hong Zheng	$30,364.88

Dated: Washington, DC, July 27, 2011.

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Lauren Esposito
Administrative Law Judge